88-1254

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

No.

October Term, 1988

TEDDYANNE SCHOO,

Petitioner,

vs.

U. S. POSTAL SERVICE; JOHN C. HOLMES; CHARLES T. HALL; JASPER GRADY; WILLIAM G. FELAND; WILLIAM DODSON; WARREN BLOOMBERG,

Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MARK ERIC HERMAN
14 W. Madison St.
Baltimore, MD 21201
(301)837-2144
Counsel for Petitioner

30 pp

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vs.

U. S. POSTAL SERVICE; JOHN C. HOLMES; CHARLES T. HALL; JASPER GRADY; WILLIAM G. FELAND; WILLIAM DODSON; WARREN BLOOMBERG,

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PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

A) QUESTION PRESENTED FOR REVIEW

Is notice of the institution of civil litigation on the supervisory employee of the Petitioner sufficient notice in order to allow Federal Rule of

Civil Procedure 15(c) to relate back an Amended Complaint adding the proper party, Postmaster General, and to allow such action to be considered a timely filing within the requiements of 42 U.S.C. Section 2000e-16(c). Given actual and timely notice, albeit to Petitioner's supervisor, and not the Postmaster General, and given the Postmaster General did not show one oita of prejudice, whether the opinion below is in direct conflict with the liberal notice requirements imported into the remedial discriminatory law statutes, as enunciated in Schiavone v. Fortune, 477 U.S. 21, 106 S.Ct. 2379, 1986. Also see: Cooper v. United States Postal Service, 471 U.S. 1022, (Dissent of Judge White).

B) PARTIES TO THE PROCEEDING

At the commencement of this action, Teddyanne Schoo was Plaintiff and U. S. Postal Service, John C. Holmes, Charles T. Hall, Jasper Grady, William G. Feland, William Dodson and Warren Bloomberg were Defendants. At the Appellate level, the Appellant was the Petitioner and the Appellee was the Respondent.

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Statutes, Rules and Regulations

42 U.S.C. Section 2000(e)-16c
Civil Rule of Federal Procedure 15(c)

D) REFERENCE TO THE OFFICIAL REPORTS BELOW

The Honorable Judge Joseph C. Howard of the United States District Court dismissed this action with prejudice for failure to name a proper party Defendant. On December 21, 1987, a Motion to Alter Amend Judgment Request for Hearing was filed and the Motion was denied January 12, 1988. The case was not reported in an official text. The Appellant decision, decided December 27, 1988 was unpublished.

E) JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1251(4).

F) STATUTES AND REGULATIONS INVOLVED IN THE PRESENT ACTION

1. Rule 15. Amended and Supplemental Pleadings
(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, of the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

2. Section 2000e-16. Nondiscrimination in Federal Government employment

(a) Discrimination prohibited. All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, [5 USCS Section 102] in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, [5 USCS Section 105] United States Code (including employees and applicatants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Role of Civil Service Commission; compliance of departments and agencies with rules and regulations. Except as otherwise provided

in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall--

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semi-annual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken or any complaint of discrimination filed by him thereunder. The plan submitted to each department, agency, and unit shall include, but not be limited to--

(1) provision for the establishment of training and eduction programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such deparment, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Civil action by party aggrieved. Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a) [subsec. (a) of this section], or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit of with the Civil Service Commission on appeal from a decision or order of such department,

agency, or unit until such time as final action may be taken by department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706 [42 USCS Section 2000e-5], in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) **Application of certain provision.** The provisions of sections 706(f) through (k) [42 USCS Sections 2000e-5(f)-(k)], as applicable, shall govern civil actions brought hereunder.

(e) **Continuing responsibility of agencies and officials to assure nondiscrimination.** Nothing contained in this Act [title] shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.
(July 2, 1964, P. L. 88-352, Title VII, Section 717, as added Mar. 24, 1972, P. L. 92-261, Section 11, 86 Stat. 111.)

G) CONCISE STATEMENT OF THE CASE

On May 13, 1987, Petitioner brought suit against the United States Postal Service and various supervisory employees pursuant to Article 47, Section 2000e-16(c) of the United States Code. The

United States Postal Service filed a motion to dismiss the claim for failure to name the proper party. Petitioner sought leave to amend the complaint and a ruling that the amended complaint should relate back under Rule 15(c). The Trial Court below denied Petitioner's motion for leave to amend and dismissed the complaint with prejudice. On February 5, 1988, an Appeal was timely noted to the 4th Circuit.

Petitioner, TEDDYANNE SCHOO, timely filed administrative charges of employment discrimination against her employer, the United States Postal Service, with the Equal Employment Opportunity Commission in January, 1982. After pursuing her grievance through the appropriate administrative hearings, the Equal Employment Opportunity Commission issued a final decision of "no discrimination." However, the initial opinion sent to Petitioner was incomplete. The corrected decision was forwarded to Appellant on April 21, 1987.

On May 13, 1987, Petitioner filed suit against the United States Postal Service and the employees who were involved in the alleged acts of discrimination against her. Petitioner's supervisor, John Holmes, was served with notice of the suit on May 23, 1987.

The Trial Court below dismissed the complaint with prejudice. The Appellant Court affirmed, erroneously holding that insufficient notice was given by service of notice on Petitioner's supervisor to satisfy Schiavone, despite no showing of actual prejudice.

H) ARGUMENTS OUTLING THE REASONS RELIED UPON FOR THE ALLOWANCE FOR THE WRIT

Petitioner strongly urges that a Writ of Certiorari should be granted in this case because Schiavone v. Fortune, 477 U.S. 21, 106 S.Ct. 2379 (1986) is being misapplied, an extremely shorter time requirement is defeating meritorious litigation, Federal Rule 15(c) is being misapplied, and

because the dissent in Cooper opened the door for a case, such as this, where actual notice was given to alleviate the harsh results of Cooper and McGuiness v. United States Postal Service, 744 F.2d 1318 (7th Cir. 1984).

The dissent in Cooper noted that "there is no unanimity among the Circuits concerning the proper interpretation of Rule 15(c)'s notice provision." 471 U.S. at 1024.

Title VII, Section 717 of the Civil Rights Act provides that "within thirty days of receipt of notice of final action" an aggrieved party may file a civil action. Final notice includes notification of the right to sue and notification of the time limit within which the action must be filed. Williams v. Hidalgo, 663 F.2d 183, 187 (D.C. Cir. 1980). The grounds for the agency action are also an important part of the notification process. See, Faulkner v. Bolger, 655 F.Supp. 717 (E.D. Ark. 1987). Here, the final notification of the decision of the Equal Employment Opportunity Commission was

not received by Petitioner until after the Commission issued their corrected decision on April 21, 1987. The statutory period does not begin to run until Petitioner has received proper notification of the agency action. Williams v. Hidalgo, 663 F.2d 183, 188 (D.C. Cir. 1980), Hornsby v. United States Postal Service, 787 F2d 87, 91 (3rd Cir. 1986). The thirty days began to run from April 24, 1987 (including the three days provided for mail delivery under Rule 6[e]).

John Holmes, Petitioner's former supervisor and an employee of the United States Postal Service, received notice of the institution of the suit by service effected on May 23, 1987, which was within the thirty day period.

After naming the wrong parties as defendants in the matter, Petitioner sought leave to amend the pleadings and a ruling that the amended pleadings related back under Rule 15(a) and 15(c). Four factors must be satisfied in order to permit an amendment to relate back to the original pleadings. The basic claim must have arisen out of the conduct

set forth in the original pleading. The added party must have received such notice that it will not be prejudiced in maintaining its defense on the merits. The party must have or should have known that but for a mistake, the action would have been brought against him. Finally, the last two requirements must have been fulfilled within the prescibed limitations period. Schiavone v. Fortune, 477 U.S. 21, 106 S.Ct. 2379, 2384 (1986). Informal notice of the commencement of the action or constructive notice is sufficient to satisfy the notice requirements of Riled 15(c). Kirk v. Cronvich, 629 F.2d 404, 408 (5th Cir. 1980); Bruce v. Smith, 581 F. Supp. 902, 906 (W.D. Va. 1984). Notice need not be effected by service of process. Eatkins v. Read, 710 F.2d 184, 187 (4th Cir. 1983). It may be inferred where the named defendant has identity of interests with the added party or is an agent for the added party. See, Kirk v. Cronvich, supra; Hendrix v. Memorial Hosptial of Galveston County, 776 F.2d 1255 (5th Cir. 1985).

Notice of the suit to Petitioner's supervisor, Postal employee John Holmes, should be considered as notice to the Postmaster General, relying on the fact that the case of Gonzales v. Department of the Air Force, 110 FRD 350 (N.D. Tex. 1986) was reversed upon the Court's reconsideration of it in light of Schiavone v. Fortune, 477 U.S. 21, 106 S.Ct. 2379 (1986). Gonzales v. Department of the Air Force, 638 F.2d 1323, 1325 (N.D. Tex. 1986). The Supreme Court, in Schiavone v. Fortune, made it clear that in order for a complaint to relate back under Rule 15(c), the added party must have received notice of the institution of the proceedings within the prescribed time period. Schiavone v. Fortune, 477 U.S. 21, 106 S. Ct. 2379, 2384 (1986). The District Court, in Gonzales v. Department of Air Force, 638 F. Supp. 1323 (N.D. Tex. 1986) granted Defendants' motion to dismiss because neither the Department of the Air Force nor the United States Attorney had been notified within the thirty day period. The Court did not reverse its earlier reasoning that

notice to a lesser agency official would be considered notice to the head of the agency. Gonzales v. Department of the Air Force, 638 F. Supp. 1323, 1325 (N.D. Tex. 1986). The Appellant Court relied on the case of Cooper v. United States, 740 F.2d 114, 715 (9th Cir. 1984), cert. denied, 105 S.Ct. 2034 (1985) in rejecting Petitioner's argument. That case is singularly not applicable here. In Cooper, no one was timely notified of the impending civil litigation within the thirty day period.

In the case at bar, notice of the civil suit was served on a supervisory employee of the United States Postal Service within the thirty day time period. The employee participated in all of the grievance proceedings on behalf of the United States Postal Service and acted with the authority of the Postal Service and, hence, the head of the agency. Clearly, an employee who had the authority to fire and defend against an employment discrimination grievance proceeding has the authority to receive

notice of the civil litigation when the aggrieved employee was unsatisfied with the results of those proceedings. See, Kirk v. Cronvich, 629 F2D 404, 407 (5th Cir. 1980); Balanciere v. United States Postal Service, 648 F. Supp. 38, 40 (D.Colo. 1984).

The purpose of Rule 15(c) is to prevent the statute of limitations fror. barring an action where the wrong party was sued but where the correct party had sufficient notice of the commencement of the action. Dutka v. Southern Railway Co., 92 F.R.D. 375, 377 (N.D. Ga. 1981). Sufficiency of the notice must be evaluated in light of the policy objectives of the statute of limitations, which include avoiding undue surprise and permitting investigation and collection of evidence while it is still fresh. Ramirez v. Burr, 607 F. Supp. 170, 173 (D.C. Tex. 1984). Identity of interests between the original and added parties is an appropriate guide in measuring the possible prejudice that could be incurred by the added party. See, Bruce v. Smith, 581 F. Supp. 902, 906 (W.D. Va. 1984); Hernandez Jimenez v.

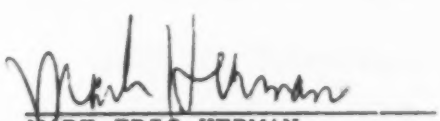
Calero Toledo, 604 F2d 99, 102-03 (1st Cir. 1979); Wood v. Worachek, 618 F2d 1225, 1230 (7th Cir. 1980); Hendrix v. Memorial Hospital of Galveston County, 776 F2d 1225, 1228 (5th Cir. 1985). The "linchpin" of the relation back rule is notice, either formal or informal, within the prescribed time period. Schiavone v. Fortune, 477 U.S. 21, 106 S.Ct. 2379, 2385 (1986).

Here, the Postmaster General had notice of the institution of the civil suit through notice of the suit to its employee, John Holmes. The Postmaster General did not personally participate in the decision to discharge Petitioner. His only knowledge of the events necessarily must come from his employee--the man who made the decision to discharge Petitioner, who fully participated in the investigation of Petitioner's complaint of discrimination at the administrative level, and the man who was timely notified of the institution of the civil action.

CONCLUSION

Either FRCP 15(c) is going to be liberally construed, or it is not. It is unfair for litigants in some circuits to have their day in Court, while others suffer seeing their cases dismissed. Dismissal is not required in this case. Timely notice was sent to a key supervisory employee with an identity of interest. No prejudice has been shown. Relating back should be favored where the statute of limitations is as short as 30 days. Relating back should be formed where the litigant seeks to remedy a discriminatory art, where rectification benefits the public as whole.

Respectfuly submitted,



MARK ERIC HERMAN
14 W. Madison Street
Baltimore, MD 21201
837-2144
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January, 1989, three copies of the above Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit and Appendix were mailed first class, postage pre-paid, to Breckenridge C. Wilcox, United States Attorney, Office of the United States Attorney, 101 W. Lombard Street, 8th Floor, United States Court House, Baltimore, Maryland 21201; Roann Nichols, Assistant United States Attorney, United States Court House, 101 W. Lombard Street, Baltimore, Maryland 21201-2692; Jesse L. Butler, Assistant General Counsel; David G. Karro, Esquire, Office of Labor Law, Room 6414, 475 L'Enfant Plaza, Washington, DC 20264.

MARK ERIC HERMAN

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-1556

TEDDYANNE SCHOO
Plaintiff - Appellant

v.

U.S. POSTAL SERVICE; JOHN C. HOLMES; CHARLES T. HALL; JASPER GRADY; WILLIAM G. FELAND; WILLIAM DODSON; WARREN BLOOMBERG
Defendants - Appellees

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, United States District Judge. (CA-87-1216JH).

Argued : November 1, 1988
Decided: December 27, 1988

Before WINTER, Chief Judge, and MURNAGHAN and SPROUSE, Circuit Judges.

Barbara Lynn Matthews for Appellant. David George Karro (Jesse L. Butler, Assistant General Counsel, Office of Labor Law, U.S. POSTAL SERVICE; Breckinridge L. Willcox, United States Attorney, Roann Nichols, Assistant United States Attorney, on brief) for Appellees.

PER CURIAM:

Teddyanne Schoo appeals the judgment of the district court dismissing her title VII action against the United States Postal Service, John C. Holmes, Charles T. Hall, Jasper Grady, William G. Feland, William Dodson and Warren Bloomberg. The district court effectively denied Schoo's Fed. R. Civ. P. 15(c) motion to amend her complaint to name the Postmaster General as a defendant by dismissing it because the Postmaster General was not so named as required by statute. We affirm.

Schoo filed a complaint before the Equal Employment Opportunity Commission in 1982 alleging discrimination in her termination from her job in the Baltimore Post Office. In 1985, she appealed the unfavorable decision within the EEOC, which determined that Schoo had no cognizable claim and so advised her in a letter of April 9, 1987, which she received on April 13.[1] The EEOC also advised her

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[1] The last paragraph of the Analysis and Findings section of the EEOC letter to Schoo ended in mid-sentence. Through her attorney, she advised them of that defect on April 14, and she received a corrected letter, dated April 21, on April 24.

that she had thirty days from the date of receipt to file an action in district court.

In Schoo's original district court complaint filed on May 13, 1987, she named the United States Postal Service and six individuals as defendants. One of those individuals, John C. Holmes, was her immediate supervisor in Baltimore. Schoo's complaint was mailed to several defendants on May 22, 1987. Holmes received his copy on May 23. To complete her action against the Postal Service, Schoo mailed the summons and complaint to the Baltimore Postmaster on May 22. He received them on May 27.[2] Schoo filed an amended complaint on October 26, 1987

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[2] It is evident from Schoo's complaint that she intended service on the Baltimore Postmaster as service on the Postal Service. However, since the Baltimore Postmaster did not receive the summons and complaint until more than thirty days after either EEOC letter, Schoo relies on her service of Holmes as furnishing the requisite notice to the Postmaster General.

naming the Postmaster General as a defendant pursuant to Rule 15(c). This, of course, was beyond the thirty-day limitation period even if that period started upon receipt of the second EEOC notification. In Schoo's rule 15(c) motion, however, she asked that the ameded complaint relate back to May 13, 1987, the date she filed her original complaint. The district court, ruling that the Postmaster General had not received the required rule 15(c) notice of the original complaint, disallowed the amended complaint and dismissed the action. On appeal, Schoo contends that, under Rule 15(c), service on Holmes, her supervisor at the Baltimore post office, was sufficient notice to the Postmaster General that the action was pending against him.

The language of title VII requires that, in actions brought against government agencies, "the head of the department, agency, or unit, as appropriate, shall be the defendant." 42 U.S.C.A. Section 2000e-16(c) (West 1981). Actions brought against the Postal Service must name the Postmaster

General as a defendant. McGuiness v. United States Postal Service, 744 F.2d 1318, 1322-23 (7th Cir. 1984); Cooper v. United States Postal Service, 740 F.2d 714, 176 (9th Cir. 1984), cert. denied, 471 U.S. 1022 (1985).

In a notice attached to the decision it forwarded to Schoo, the EEOC adviser her that:

> . . . [T]he attached decision in your case is final. You have the right to file a civil action in the appropriate United States District Court WITHIN THIRTY (30) DAYS from the date that you receive this decision . . . . You are further notified that if you file a civil action, YOU MUST NAME THE APPROPRIATE OFFICIAL AGENCY OR DEPARTMENT HEAD AS THE DEFENDANT. Rule 25(d)(2) of the Federal Rules of Civil Procedure provides that you may describe the defendant by official title rather than by name. Failure to provide the NAME OR OFFICIAL TITLE of the agency head or, where appropriate, the depatment head, may result in the loss of any judicial redress to which you may be entitled. (Please note: For this purpose, Department means the overall national organization, such as the now defunct Department of Health, Education and Welfare, not the local administrative department where you might work.) You must be sure that the proper defendant is named when you file your civil action.

Rule 15(c) provides in part:

> An amendment changing the party against whom a claim is asserted relates back if . . . , within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

"The linchpin [of rule 15(c)] is notice . . . " Schiavone v. Fortune, 477 U.S. 21, 31, (1986). Even if we were to use April 24, 1987 as the date the thirty-day period began to run, and thereby eliminate any timeliness problem regarding service on the substitute party, see Schiavone, id., Holmes was not an adequate substitute for the Postmaster General. We cannot construe the notice requirement of Rule 15(C) so liberally as to hold that notice of an action against the head of a huge organization such as the Postal Service can be effected by naming and serving a minor supervisory employee far removed from the cental commnand and from any organizational

structure through which the department head ordinarily responds to litigation.

The Postal Service is organized in such a way that

> [t]he General Counsel of the Postal Service shall act as agent for the receipt of legal process against he Postal Service, and as agent for the receipt of legal process against . . . all . . . officers and employees of the Postal Service . . .

39 C.F.R. Section 2.2 (1988). Although we would not assume that all postal employees are aware of that regulation, its promulgation certainly represents a reasonable exercise of the postmaster's discretion. Short of correct service through designated channels, the postmaster would be placed on notice so as to satisfy the requirement of rule 15(c) by other appropriate service. Rule 15(c) provides:

> The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and

> (2) hereof with respect to the Unites States or any agency or officer thereof to be brought into the action as a defendant.

See also rule 4(d)(5), which provides that service on any agency of the United States may be obtained by delivering a copy of the summons and complaint to the United States Attorney for the district in which the action is brought, or to his assistant or designee, and mailing the same to the Attorney General and the agency. The above quoted language of Rule 15(c) designating specific officials, upon whom service would comprise adequate rule 15(c) notice, is obviously not exclusive and implies that service on some other officials might achieve the same result. Without exploring all of those possibilities, suffice it to say that, in our view, a supervisory employee of a local post office is not such an official.

In view of the above, the judgment of the district court is affirmed.

AFFIRMED

No. 88-1254

Supreme Court, U.S.
FILED
MAY 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

TEDDYANNE SCHOO, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
ROBERT S. GREENSPAN
WILLIAM G. COLE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Whether a complaint filed under 42 U.S.C. 2000e-16(c), which failed properly to name the Postmaster General as the defendant, could be amended pursuant to Fed. R. Civ. P. 15(c) because notice of the action had been given to a local Postal Service supervisor within the statutory limitations period.

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Statute, regulation and rule:

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1254

TEDDYANNE SCHOO, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22-29) is unpublished, but the decision is noted at 865 F.2d 1259 (Table). The order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1988. The petition for a writ of certiorari was filed on January 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1982, Teddyanne Schoo was discharged from her job as a U.S. Postal Service distribution clerk at the main Baltimore, Maryland post office. Shortly thereafter, she

filed a complaint with the Equal Employment Opportunity Commission alleging that she had been terminated because of unlawful discrimination. On April 13, 1987, she received a letter from the agency, dated April 9, 1987, informing her of the EEOC's determination that no cognizable discrimination had occurred in her case. Pet. App. 23. Although the letter clearly conveyed the EEOC's conclusion of "no discrimination," one paragraph of the accompanying opinion ended in mid-sentence. See EEOC Appeal No. 01852831, at 6 (April 9, 1987), C.A. App. 28. Petitioner so notified the EEOC through counsel; she received a corrected opinion, dated April 21, 1987, on April 24, 1987. Pet. App. 23.

A notice attached to the April 13 letter advised petitioner that she had thirty days from the date of receipt to file an action in district court. It also cautioned her that:

> [I]f you file a civil action, YOU MUST NAME THE APPROPRIATE OFFICIAL AGENCY OR DEPARTMENT HEAD AS THE DEFENDANT. Rule 25(d)(2) of the Federal Rules of Civil Procedure provides that you may describe the defendant by official title rather than by name. Failure to provide the NAME OR OFFICIAL TITLE of the agency head or, where appropriate, the depa[r]tment head, may result in the loss of any judicial redress to which you may be entitled. (Please note: For this purpose, Department means the overall national organization, such as the now defunct Department of Health, Education and Welfare, *not* the local administrative department where you might work.) You must be sure that the proper defendant is named when you file your civil action.

Pet. App. 26. This notice explained the requirement of Section 717(c) of the Civil Rights Act of 1964 (Title VII),

42 U.S.C. 2000e-16(c), that "[w]ithin thirty days of receipt of notice of final action," an aggrieved employee may file a suit "in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant."[1]

2. On May 13, 1987, Schoo, through counsel, filed a complaint in the district court, naming as defendants the United States Postal Service and six individuals, not including the head of the Postal Service, the Postmaster General. She specified that service on the Postal Service be made to James A. McDougald, the postmaster of the main U.S. post office in Baltimore. She listed the other named defendants, all employees of the Postal Service, with their home addresses, or as having "address unknown." In addition, the address of one defendant was given as "Equal Employment Opportunity Commission", at a Philadelphia address, and the address of another was given as the post office in Gaithersburg, Maryland. See Compl. 1, C.A. App. 4.

The Baltimore postmaster and four of the five other defendants were eventually served by sending copies of the complaint and summons to them by certified mail. John

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[1] The EEOC has amended the statement of appeal rights provided with its final decisions on claims of discrimination. The statement now reads:

> YOU *[i.e., the complainant]* MUST NAME THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD AS THE DEFENDANT. *Agency or department means the national organization, and not the local office, facility or department in which you might work.* DO NOT NAME JUST THE AGENCY OR DEPARTMENT. You must also state the official title of the agency head or department head. Failure to provide the NAME OR OFFICIAL TITLE of the agency head or department head may result in the dismissal of your case.

See, *e.g.*, *Smith* v. *Thomas*, EEOC Appeal No. 01883225 (Feb. 2, 1989), slip op. 7-8 (emphasis in original).

C. Holmes, described in the complaint as petitioner's immediate supervisor (Compl. 3, C.A. App. 6), was served at his home address on May 23, 1987; the Baltimore postmaster was served on May 27, 1987. Aff. of Compliance (filed June 18, 1987), C.A. App. 10. The United States Attorney for the District of Maryland was served with a copy of the complaint on August 10, 1987. Civil No. JH-87-1216, at 1 (D. Md. Jan. 12, 1988) (memorandum order), C.A. App. 62.

3. After the Postal Service filed a motion to dismiss for failure to file in a timely manner against the proper defendant, petitioner filed a motion to amend her complaint by naming the Postmaster General of the United States as a defendant and requesting leave to have the amendment relate back to the date of the original pleading pursuant to Rule 15(c) of the Federal Rules of Civil Procedure. Pet. App. 24-25. The district court disallowed petitioner's motion and dismissed her complaint. Mem. 1-3, C.A. App. 62-64. The district court ruled that even if Schoo were viewed as having received notice on April 24, rather than on April 13, no appropriate government official was served until after the expiration of the 30 day period in which suit could be filed under 42 U.S.C. 2000e-16(c): it found that service on a "lesser government official" within the 30 day period did not satisfy the notice requirements of Rule 15(c) so that the amendment could "relate back" to the original date of filing,[2] and it determined that effective notice to the United States Attorney,

[2] The district court was presumably referring to John C. Holmes as the "lesser government official." As the court of appeals noted, even assuming that Schoo had received final notice only when she received the second, corrected EEOC letter on April 24 (Pet. App. 27), her service on the postmaster of the main Baltimore post office did not take place until May 27. By contrast, Holmes was served on May 23, within the 30-day limitations period, if that period was triggered on April 24.

which *would* have satisfied Rule 15(c) requirements, did not occur until over two months after the expiration of the limitations period. Mem. 2, C.A. App. 63 (citing *Schiavone* v. *Fortune,* 477 U.S. 21 (1986)).

The court of appeals affirmed, rejecting petitioner's argument that her service on Holmes furnished the requisite notice to the Postmaster General. Pet. App. 27-29. The court did not attempt to define the specific Postal Service officials on whom service would provide adequate Rule 15(c) notice, but ruled that "in our view, a supervisory employee of a local post office is not such an official." Pet. App. 29.

ARGUMENT

1. Under Rule 15(c) of the Federal Rules of Civil Procedure, an amendment changing a party against whom a claim is asserted "relates back" to the date the original complaint was filed only if a plaintiff has given adequate notice to the proper defendant within the applicable limitations period. As clarified by this Court in *Schiavone* v. *Fortune,* 477 U.S. at 29:

> Relation back is dependent upon four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

As in *Schiavone*, requirements (2), (3), and (4) were not met by petitioner in the present case. She filed her civil action on May 13, 1987, exactly thirty days after notice of

the EEOC's decision. Her complaint, however, failed to name the proper statutory defendant, the Postmaster General. The first notice received by any of the *named* defendants in the case was ten days later, May 23, 1987. Therefore, the Postmaster General neither received notice nor "should have known" about the action by May 13, the last day within the prescribed limitations period. In fact, the district court indicated that the Postmaster General did not receive proper notice within the meaning of Rule 15(c) until August 10, 1987, when the United States Attorney for the District of Maryland received a copy of the complaint from the petitioner by certified mail. Mem. 2, C.A. App. 63.

2. Petitioner received a copy of the *corrected* EEOC letter on April 24, 1987. Pet. 23 n.1. She argues that it is the date of receipt of this letter, sent after her attorney advised the EEOC of a defect in the copy she received on April 13, that began the 30 day period within which she could file a civil action.

The argument is without merit. Section 717(c) of Title VII, 42 U.S.C. 2000e-16(c), provides that an appeal may be filed within 30 days "of receipt of notice of final action taken by * * * [the EEOC]." Petitioner received such notice on April 13, 1987, when she received the April 9, 1987, "no discrimination" decision. The corrected copy of the opinion subsequently sent did not constitute notice of a different "final action." It was merely another copy of the original "notice" with the identical "Conclusion" but with appropriate correction of a defective paragraph in the "Analysis and Findings" section.[3]

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[3] When she filed her complaint in district court, petitioner stated that she had been notified of the EEOC decision "on April 13, 1987." Compl. 3. It was only after the Postal Service moved to dismiss her lawsuit on late filing grounds that she alleged she had not been notified until April 24. Petitioner does not contend that she did not understand until April 24 what the EEOC had determined in the letter she received April 13.

3. As the court of appeals determined (Pet. App. 27), even if petitioner did not receive notice sufficient to trigger the running of the limitations period until April 24, her claim still fails. It depends on her contention that the service on John Holmes, petitioner's immediate supervisor at the Baltimore post office in 1982, at his home address on Saturday, May 23, 1987, "would be considered notice to the * * * [Postmaster General]" since Mr. Holmes "had the authority to fire and defend against an employment discrimination grievance proceeding." Pet. 17.

In *Schiavone,* this Court recognized that Rule 15(c) could be satisfied only if the defendant to be brought in by the amendment, " 'received * * * notice of the institution of the action [within the applicable limitations period],' " and further noted that " 'the notice need not be formal.' " 477 U.S. at 31 (quoting Fed. R. Civ. P. 15 advisory committee note (emphasis deleted)). But *Schiavone*'s provision that notice to a party need not be "formal" is far from petitioner's contention that a party need not be notified, even informally, because someone else in his organization *was* notified. As the court of appeals put it:

> [w]e cannot construe the notice requirement of Rule 15(c) so liberally as to hold that notice of an action against the head of a huge organization such as the Postal Service can be effected by naming and serving a minor supervisory employee far removed from the cent[r]al comm[an]d and from any organizational structure through which the department head ordinarily responds to litigation.

Pet. App. 27-28.

The court of appeals found no evidence that anyone higher in the Post Office hierarchy than petitioner's superior was aware of her lawsuit until long after expiration of the limitations period. If "the linchpin [of Rule

15(c)] is notice, and notice within the limitations period" (*Schiavone*, 477 U.S. at 31), then service on Mr. Holmes was insufficient. See, *e.g.*, *Honeycutt* v. *Long*, 861 F.2d 1346, 1350-1351 (5th Cir. 1988) (service on head of subdivision of Department of Defense not sufficient under Rule 15(c) to serve as notice of Title VII suit to Secretary of Defense).[4]

The conclusion applies with special force here. First, petitioner received but failed to heed explicit instructions sent to her by the EEOC with its "no discrimination" letter. That notice warned her that "if you file a civil action, YOU MUST NAME THE APPROPRIATE OFFICIAL AGENCY OR DEPARTMENT HEAD AS THE DEFENDANT. * * * Failure to provide the NAME OR OFFICIAL TITLE of the agency head or, where

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[4] Nor is *Kirk* v. *Cronvich*, 629 F.2d 404 (5th Cir. 1980), cited by petitioner (Pet. 15), to the contrary. In that case, the court found that the sheriff of the Parish of Jefferson had been effectively notified when suit was filed against the Parish and the Parish Sheriff's Office. Although service was eventually perfected to a deputy sheriff, the complaint had specified that service should be made to the sheriff; the Sheriff's Office and the sheriff were represented by the same attorneys; the deputy sheriff acted as the sheriff's agent since it could be assumed that he would bring the matter to the sheriff's attention; the deputy sheriff had clearly told the attorneys shared by the sheriff and Sheriff's Office about the suit; and relations between the sheriff and the Sheriff's Office were sufficiently close that they shared an "identity of interest". See 629 F.2d at 407-408. Simiarly, in *Hendrix* v. *Memorial Hospital*, 776 F.2d 1255 (5th Cir. 1985), also cited by petitioner (Pet. 15), the court concluded that service to Memorial Hospital of Galveston County Auxiliary, Inc. sufficed to notify Memorial Hospital of Galveston County where the two institutions shared the same mailing address, the same counsel and were located in the same building complex. See 776 F.2d at 1257-1258. In any event, both *Kirk* and *Hendrix* were decided before *Schiavone* and any inconsistency between those cases and the instant decision is no longer relevant given this Court's decision in *Schiavone*.

appropriate, the depa[r]tment head, may result in the loss of any judicial redress to which you may be entitled." Pet. App. 26.

And even if, despite this warning, petitioner had remained uncertain of whom to sue, she could have preserved her option to amend her complaint by delivering or mailing process "to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named." Fed. R. Civ. P. 15(c). As we have explained at greater length in our brief in opposition (at 7-8) recently submitted in *Bates* v. *Tennessee Valley Authority*, petition for cert. pending No. 88-1548,[5] that provision of Rule 15(c) is specifically designed to provide persons suing the government with a means to protect themselves against the consequences of naming the wrong federal defendant. See *Cooper* v. *United States Postal Service,* 740 F.2d 714, 717 (9th Cir. 1984), cert. denied, 471 U.S. 1022 (1985); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I),* 81 Harv. L. Rev. 356, 407-410 (1967).

Thus, if petitioner had mailed or delivered the process to the United States Attorney, or any of the other officials listed in Rule 15(c), "within the period provided by law for commencing the action against [the proper defendant]," her amendment of the complaint to name the proper defendant would have related back to the date of filing of the original complaint.[6] In the current case, however, the

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[5] The principal issue in *Bates* is whether Rule 15(c)'s notice requirements apply in cases involving the federal government; petitioner in the present case concedes (Pet. 14-19) that they do apply. We have furnished a copy of our brief in *Bates* to counsel for petitioner in this case.

[6] As the court of appeals noted (Pet. App. 28), service on the Postmaster General can also be accomplished by serving the General Counsel of the Postal Service. See 39 C.F.R. 2.2.

U.S. Attorney was served on August 10, 1987, more than two months after the expiration of the most generously calculated limitations period. That delay defeats petitioner's claim.[7] As this Court explained in *Schiavone*:

> Of course, there is an element of arbitrariness here, but that is a characteristic of any limitations period. And it is an arbitrariness imposed by the legislature and not by the judicial process.

477 U.S. at 31; see also *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 152 (1984) (in Title VII suits, as in other actions, "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law").

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[7] Petitioner has not alleged that either the Postal Service or the EEOC engaged in affirmative misconduct, active misrepresentation, or any other activity that would support an argument that the 30-day filing period should be tolled on equitable grounds. Like *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147 (1984), "[t]this is not a case in which a claimant has received inadequate notice; or where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon; or where the court has led the plaintiff to believe that she had done everything required of her * * * [or] where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction." *Id.* at 151 (citations omitted). To the contrary, petitioner received adequate notice of the procedural requirements from the plain language of Section 717(c) of Title VII, 42 U.S.C. 2000e-16(c), which on its face specifies the proper defendant; she was represented by counsel throughout the litigation; and she received explicit instructions from the EEOC that she had to name the head of her agency as the proper defendant in order to preserve any judicial redress to which she could be entitled.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
ROBERT S. GREENSPAN
WILLIAM G. COLE
Attorneys

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